Supreme Court, U.S.
FILED
DEC 8 1999
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(2)

No. 99-605

In the Supreme Court of the United States

OCTOBER TERM, 1999

WILLIAM THOMAS, *et al.*,

Petitioners,

v.

NETWORK SOLUTIONS, INC.
AND
NATIONAL SCIENCE FOUNDATION,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT NETWORK SOLUTIONS, INC. IN OPPOSITION

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Dated: December 8, 1999

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The petition presents the following two questions for review:

1. Did the court of appeals err in holding that Section 8003 of the 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, 112 Stat. 58, 93-94 (1998) validly ratified the provisions of the Cooperative Agreement between Network Solutions, Inc. ("NSI") and the National Science Foundation ("the NSF") in accordance with which 30 percent of the Internet domain name registration payments collected by NSI was placed in a custodial fund dedicated to the enhancement of the "intellectual infrastructure" of the Internet?

2. Did the court of appeals err in holding that the Internet domain name registration services that NSI provides to domain name holders pursuant to contracts between NSI and the domain name holders are not services "provided by [a Government] agency" within the meaning of the Independent Offices Appropriations Act, 31 U.S.C. § 9701?

NSI's opposition to the petition addresses only Question 2. While NSI believes that both questions were correctly decided below, NSI defers to the Government's discussion of Question 1.

RULE 29.6 LISTING

The petition accurately lists the parties to the proceeding. Approximately 45 percent of the outstanding stock of respondent NSI is owned by Science Applications International Corporation. SAIC is not publicly traded. NSI has no other parent corporation; nor does any publicly held company own ten or more percent of NSI's stock.

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NETWORK SOLUTIONS, INC.
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT NETWORK SOLUTIONS, INC. IN OPPOSITION

Respondent Network Solutions, Inc. ("NSI") respectfully requests that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on May 14, 1999.

COUNTERSTATEMENT OF THE CASE

Respondent NSI is a publicly traded company whose business involves providing private parties with registration services for certain categories of Internet "second-level domain names" — designations such as "smith.com" that serve as easy-to-use routing addresses on the Internet. Petitioners are nine individuals and companies that entered into year-to-year contracts with NSI to have NSI register and maintain their chosen second-level domain names. Petitioners paid NSI the annual contract price, and NSI provided the services. Having received the services and retained the benefits, petitioners — on behalf of themselves and a purported class consisting of all domain name holders for whom NSI provides registration services — brought suit in the U.S. District Court for the District of Columbia seeking to have the contract payments refunded and alleging damages in excess of $100 million. The district court dismissed appellants' First Amended Complaint, and a unanimous panel of the U.S. Court of Appeals for the District of Columbia affirmed the dismissal.

A. Background

1. Overview of the Internet

The Internet is not a governmental entity. It is a global network of networks that transcends national boundaries. As this Court has stated, "[t]he Internet is an international network of interconnected computers." *Reno v. ACLU*, 521 U.S. 844, 849 (1997). As another court described it, "[t]he Internet is a decentralized, global communications medium linking people, institutions, corporations, and governments all across the world." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 164 (S.D.N.Y. 1997) (citation omitted).

Although the Internet originated from a 1969 project of the Defense Advanced Research Projects Agency called "ARPANET," the Internet has long since outgrown its

origins. "Though government played a role in financing the initial development of the Internet, its expansion has been driven primarily by the private sector." The White House, *A Framework for Global Electronic Commerce* (July 1, 1997), at Principles § 1. This Court has emphasized the same point:

> While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world.

Reno, 521 U.S. at 850. Other nations have funded and made major contributions to the Internet. For example, scientists at the European nuclear research center CERN in Switzerland developed the software, protocols, and conventions that form the basis of the World Wide Web. Department of Commerce, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741, 31742 (1998).

As petitioners acknowledged below, "the Internet is unregulated." Plaintiffs' Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction, Dec. 17, 1997, at 22 (emphasis omitted). "The Internet has operated by consensus rather than by government regulation." Department of Commerce, *Request for Comments on the Registration and Administration of Internet Domain Names*, 62 Fed. Reg. 35896, 35896 (1997). *See also ACLU v. Reno*, 929 F. Supp. 824, 832 (E.D. Pa. 1996) (Finding of Fact No. 11) (emphasizing the consensus-based nature of the Internet), *aff'd*, 521 U.S. 844 (1997).

Use of the Internet grew exponentially in the 1990's. In 1989, fewer than 90,000 computers were linked directly to the Internet. By 1993, there were over one million. By 1996,

the number exceeded 9,400,000.[1] *Reno*, 929 F. Supp. at 831; *Pataki*, 969 F. Supp. at 164. This Court has estimated that the number of people using the Internet will reach 200 million this year. *Reno*, 521 U.S. at 850.

2. Domain Names and Domain Name Registration

Each computer linked directly to the Internet (often called a "host" computer) has a unique identifying Internet Protocol (or "IP") number, such as "145.83.206.127," that allows other host computers to identify and locate it. IP numbers are hard for most people to remember and use. Consequently, host computers may have "domain names" assigned to them as well.

Domain names are designations such as "smith.com" that serve as easy-to-use routing addresses. "Domains" are hierarchically structured. The example just given — "smith.com" — is a "second level" domain name. The ".com" is a "top-level domain"; "smith.com" is a second-level domain within the ".com" top-level domain; "john.smith.com" is a third-level domain within the "smith.com" second-level domain; and so on. NSI registers second-level domain names within the ".com," ".org," ".edu," and ".net" top level domains. There are over 240 other top-level domains, including so-called "country code" domains such as ".us" for the United States, ".pa" for Panama, ".vi" for the U.S. Virgin Islands, ".uk" for the United Kingdom, and so on. *See* 63 Fed. Reg. at 31742. United States residents can register domain names in scores of these domains.[2] They can also register third- and higher-level domain names through "Internet service providers."

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[1] These figures do not include users who access the Internet via modem. *Pataki*, 969 F. Supp. at 164.

[2] The record below lists 72 top level domains in which United States residents can register second-level domain names.

"Registering" domain names — as NSI does for the names in ".com" and several other top-level domains — involves a range of tasks, including receiving and processing applications to create a new domain name corresponding to a specified IP number, receiving and processing applications to re-register existing domain names, determining whether or not each proposed new or modified domain name duplicates a name already in the appropriate directory database, making a new entry in the directory database for each new or modified name, deleting entries for domain names whose registrations are discontinued, maintaining and updating customer files, answering customer queries, implementing security policies, responding to disputes over registration and use of domain names, and so on. *See* Department of Commerce, *Improvement of Technical Management of Internet Names and Addresses*, 63 Fed. Reg. 8826, 8828 (1998) (grouping various registration tasks into "registry" functions and "registrar" functions).

B. The Cooperative Agreement Between NSI and the NSF

The Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, 92 Stat. 3 (1978), *codified at* 31 U.S.C. §§ 6301 *et seq.* (hereinafter "FGCAA"), specifies three kinds of legal instruments that agencies of the Federal Government may use in their dealings with private parties. When the principal purpose of a transaction is to acquire goods or services "for the direct use or benefit of the United States Government," agencies are to use "procurement contracts." *Id.* § 6303. By contrast, when the principal purpose is "to carry out a public purpose of support or stimulation authorized by a law of the United States" rather than to acquire goods or services for the Government,

agencies are to use either "grant agreements" or "cooperative agreements." *Id.* §§ 6304, 6305.[3]

In 1992, Congress amended the National Science Foundation Act, 42 U.S.C. §§ 1861 *et seq.* ("the NSF Act"), to authorize the NSF

> to foster and support access by the research and education communities to computer networks which may be used substantially for purposes in addition to research and education in the sciences and engineering, if the additional uses will tend to increase the overall capabilities of the networks to support such research and education activities.

42 U.S.C. § 1862(g), *added by* Scientific and Advanced Technology Act of 1992, Pub. L. No. 102-476, § 4, 106 Stat. 2297, 2300 (1992). To help effectuate this "public purpose of support," 31 U.S.C. § 6305(1), the NSF, on December 31, 1992, awarded NSI a cooperative agreement ("the Cooperative Agreement") under which NSI would provide Internet registration and administration services to the public and the NSF would pay NSI for those services on a cost-plus-

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[3] As between these two types of instruments, a grant agreement is used when there is not expected to be "substantial involvement" between the agency and the recipient (*i.e.*, the private party to the agreement) in performing the contemplated activity. 31 U.S.C. § 6304(2). When "substantial involvement" between the agency and the recipient is expected, a cooperative agreement is used. *Id.*, § 6305(2). Cooperative agreements and grant agreements — which together are often referred to as "assistance awards" — may be awarded to for-profit organizations. Office of Management and Budget, *Implementation of Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. No. 95-224): Final OMB Guidance*, 43 Fed. Reg. 36860, 36862 (1978). Cooperative agreements and grant agreements are flexible, and agencies' use of them is "not restricted to traditional assistance transactions." *Id.*

fixed-fee basis. Pet. 110a-24a.[4] The Cooperative Agreement stated that the arrangement could be modified in the future to provide for NSI to be paid through user fees that NSI would charge the registrants — *i.e.*, to provide that NSI's services be paid for by the parties who receive and benefit from them, rather than continue to be subsidized by the U.S. Government and the taxpayers. Pet. 116a (¶ 3.G).

The Cooperative Agreement took effect on January 1, 1993. It provided for a mid-term performance review by December 31, 1994, to permit the NSF to "review the project to determine whether to continue funding and to provide general direction as to the continuation and contemplated level of future support to be provided for the remainder of the agreement." Pet. 117a (¶ 5.B). The Mid-Term Performance Review Panel, whose members were unaffiliated with both NSI and the NSF, recommended that the NSF (and the taxpayers) should stop subsidizing the domain name registration process and that NSI should immediately begin to charge domain name registrants for services rendered to them.

Accordingly, on September 13, 1995, NSI and the NSF entered into Amendment 4 to the Cooperative Agreement. Pet. 131a-34a. Amendment 4 "modif[ied] the [A]greement to allow for the collection of user fees for registration services and [to] establish the provisions for the use, disbursement and accountability of Program Income generated by such fees." Pet. 131a. Under the Amendment, NSI would, starting September 14, 1995, charge domain name registrants an initial registration fee of $100 for registration services for the

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[4] "Pet." followed by a number refers to the page number of the petition for a writ of certiorari. "Pet." followed by a number and the letter "a" refers to the page number of the Appendix to the Petition. "Opp." followed by a number and the letter "a" refers to the page number of the Appendix to this Opposition.

first two-year period, and $50 per year thereafter, with 70 percent of the fee ($35 annually) to go to NSI "as consideration for the services provided" and 30 percent ($15 annually) to be placed in a custodial account to be used "for the preservation and enhancement of the 'Intellectual Infrastructure' of the Internet . . . ." Pet. 131a-32a.[5]

Through December 1997, NSI had provided registration services to over 2 million domain name holders pursuant to individual contracts with each of them. NSI has invested millions of dollars in building and maintaining the infrastructure needed to meet the demand for domain name services, as well as in hiring and training the workforce needed to service the thousands of customer applications and inquiries it receives every day.[6]

In providing these services, NSI was conducting its own business and was not acting on behalf of the Government. As Government counsel stated in the district court, "the mass scale registration of commercial domain names has never,

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[5] During the fiscal year 1998 appropriations process, Congress directed the NSF to withdraw $23 million from this "intellectual infrastructure" fund for use in supporting the NSF's "Next Generation Internet" initiative. H.R. Rep. No. 105-297, at 134 (1997). Congress thereafter directed the NSF to deposit all money remaining in the fund into the U.S. Treasury and to credit that amount to the NSF's fiscal year 1998 "Research and Related Activities" appropriation to be available to support networking activities, including the "Next Generation Internet." 1998 Supplemental Appropriations and Rescissions Act, Pub. L. No. 105-174, § 8003(b), 112 Stat. 58, 93-94 (1998) (Pet. 98a). By Amendment 9 to the Cooperative Agreement, the "intellectual infrastructure"-fund portion of the registration fee was discontinued for registrations made on or after April 1, 1998.

[6] The record below showed that in the month of December 1997 alone NSI performed 119,194 new domain name registrations, executed 150,656 domain name record modifications, answered 39,218 telephone inquiries, and received 547,615 e-mail messages (over 17,000 per day).

never been a Government function, ever." Transcript of Hearing, Nov. 24, 1998 ("Tr."), at 26-27.

C. Proceedings in the District Court

In their First Amended Complaint ("Amended Complaint" or "AC") petitioners alleged that they applied to NSI to register their chosen domain names, that NSI did register their domain names, and that they were required to pay registration fees to NSI for its services. AC ¶¶ 10-17, 19 (Opp. 5a-6a, 7a). In other words, petitioners alleged that there was a contract — a registration agreement — between each of them and NSI and that NSI performed its side of the bargain. Petitioners contend, however, that they should not have had to pay the contract price.

Petitioners claimed that the fees they paid were unlawful under a variety of theories. Some of the theories were directed only to the 30 percent (or $15) component of the $50 annual payment that was placed into a dedicated fund for use in enhancing the "intellectual infrastructure" of the Internet. Other theories were directed to the 70 percent (or $35) component that NSI retained as consideration for services provided. As relief, petitioners sought, among other things, the return of the "above cost" fees they and the class they purport to represent paid, including both the part that went to NSI as payment for services rendered and the part that went into the "intellectual infrastructure" fund.

On April 6, 1998, the district court issued a memorandum opinion and order deciding dispositive cross-motions. Pet. 41a-78a, *reported at* 2 F. Supp. 2d 22 (D.D.C. 1998), *aff'd*, 176 F.3d 500 (D.C. Cir. 1999). With respect to the 30 percent "intellectual infrastructure" component of the registration payment, the district court granted petitioners' motion for summary judgment on Count I of the Amended Complaint, holding that the 30 percent "intellectual infrastructure" component was in substance a tax and that it

was illegal under Article I, Section 8 of the Constitution because it had not been approved by Congress. Pet. 51a-61a.

On the other counts, the district court granted the motions of NSI and the NSF to dismiss for failure to state a claim. Pet. 67a-77a. With respect to petitioners' claims that the registration fees violated the Independent Offices Appropriation Act, 31 U.S.C. § 9701, which requires Government agencies to use certain criteria in setting fees for services they provide, the district court held that the registration services NSI provides to domain name holders pursuant to its contracts with them are not services provided by a Government agency, and that the IOAA therefore does not apply to those services. Pet. 71a-72a. The district court deferred entry of a final order pending further proceedings with respect to remedy on Count I. Pet. 63a.

Shortly thereafter, Congress ratified the 30 percent "intellectual infrastructure" payments. 1998 Supplemental Appropriations and Rescissions Act, § 8003, Pub. L. No. 105-174, 112 Stat. 58, 93-94 (1998). Based on Section 8003, the NSF moved to dismiss Count I as moot, on the ground that Congress had specifically "legalized and ratified and confirmed" the component that the district court had found to constitute an unauthorized tax. *Id.* The district court held Section 8003 to be a valid ratification and dismissed the entire case. Pet. 25a-40a. The district court, after a further hearing, denied petitioners' motion for post-judgment relief.

D. Proceedings in the Court of Appeals

Petitioners appealed to the U.S. Court of Appeals for the District of Columbia. Following oral argument, a unanimous panel affirmed the judgment of the district court. Pet. 1a-24a, *reported at* 176 F.3d 500.

With respect to petitioners' claim that NSI's fees for its registration services violated the IOAA, the court of appeals held that "the Independent Offices Appropriations Act does

not cover the fees Network Solutions charged for its services." Pet. 24a. The court of appeals found that several considerations all supported the conclusion that NSI's registration services are not services "provided by [a Government] agency" within the meaning of the IOAA.

First, the court of appeals noted that petitioners themselves had acknowledged, in their Amended Complaint, that the NSF neither provides the registration services itself nor "directly supervise[s] or manage[s] any NSI activities pertaining to the Domain Name registration process." Pet. 22a, *quoting* AC ¶ 54 (Opp. 16a).

Second, looking to "[t]he key governing statute" — the National Science Foundation Act of 1950, as amended, 42 U.S.C. § 1862(g) — the court of appeals stated that "Congress chose not to require NSF or any other agency of the federal government to register domain names," and that the mere possibility that "NSF might have been able to perform domain name registration" (a point the court did not need to decide) was not sufficient to "transform [NSI's] activity into a government service or thing of value." Pet. 21a, 22a. The court also observed that "[a] recent and novel function such as domain name registration hardly strikes us as a 'quintessential' government service, as [petitioners] suppose." Pet. 22a-23a.

Third, the court of appeals held that petitioners' proposition — that the fees NSI receives from domain name holders as consideration for services it provides to them are subject to the IOAA — is a "nonfit" with other related statutory provisions, specifically (1) the requirement that fees from Government services be paid into the Treasury as miscellaneous receipts and (2) the provision that any official or agent who does not pay such money into the Treasury may be "removed from office." Pet. 23a-24a. As the court concluded, NSI "is under no duty to turn over any portion [of

the fees it receives for its services] to the federal government," and the sanction of removal "makes no sense with respect to a private actor like Network Solutions." Pet. 24a.

Fourth, the court of appeals held that the two Comptroller General decisions upon which petitioners relied in support of their IOAA argument were inapposite. Pet. 23a. In each of those cases, a federal agency with a statutory duty to copy and produce agency records to the public upon request hired a private firm to perform those tasks for it, so that the firm was indeed providing Government agency services. The situation here does not involve such "contracting out" of agency responsibilities, since, as the court of appeals emphasized, the NSF does not have any responsibility for registering Internet domain names.

Petitioners moved for rehearing and rehearing en banc, both of which the court of appeals denied. Petitioners then petitioned this Court for certiorari.

REASONS FOR DENYING THE WRIT

The Independent Offices Appropriations Act, 31 U.S.C. § 9701, sets forth criteria governing the fees that Government agencies may charge for "service[s] or thing[s] of value provided by an agency." Four federal judges — one district judge and three appellate judges — have all agreed that the fees NSI receives as consideration for its domain name registration services are not subject to the IOAA, because they are not fees for services performed by a Government agency, but rather fees for services performed by a private company. Not satisfied, petitioners now ask this Court to consider the same question. The Court should decline to do so.

There is no conflict between the decision below and the decision of any other court of appeals. Indeed, there is no conflict between the decision below and any decision by any

federal or state court. No court has ever construed the IOAA to apply to fees for services provided by private parties. Every IOAA case has involved goods or services provided by a federal agency, generally in contexts where the recipients of the services were regulated by the agency.[7]

This case does not involve services provided or regulated by a federal agency. As the Supreme Court, other federal courts, Congress, and the Department of Commerce have all stated, the Internet is a global network of private networks that is not owned or operated by the United States Government and that "operate[s] by consensus rather than by

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[7] For example, *National Cable Television Ass'n v. FCC*, 554 F.2d 1094 (D.C. Cir. 1976) involved fees the Federal Communications Commission charged to cable television operators and broadcasters to offset its cost of processing license applications. *Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission*, 601 F.2d 223 (5th Cir. 1979) involved fees the Nuclear Regulatory Commission imposed on license applicants to cover its cost of inspecting nuclear power plants. *Phillips Petroleum Co. v. FERC*, 786 F.2d 370 (10th Cir. 1986) involved fees the Federal Energy Regulatory Commission charged to cover its cost of processing natural gas pipeline permit applications. *Ayuda, Inc. v. Attorney General*, 661 F. Supp. 33 (D.D.C. 1987), *aff'd*, 848 F.2d 1297 (D.C. Cir. 1988), involved fees the Immigration and Naturalization Service charged to cover its cost of administering immigration appeals and requested stays of deportation orders. *Seafarers International Union v. United States Coast Guard*, 81 F.3d 179 (D.C. Cir. 1996) involved fees the Coast Guard charged to cover its cost of processing maritime license applications and background checks. And *Central & Southern Motor Freight Tariff Ass'n v. United States*, 777 F.2d 722 (D.C. Cir. 1985) involved fees the Interstate Commerce Commission charged to cover its cost of processing rate agreements and tariffs.

The IOAA can also apply to the sale of goods or services by a Government agency to a private party in a non-regulatory context, as was the case in *Yosemite Park & Curry Co. v. United States*, 686 F.2d 925 (Ct. Cl. 1982). In such situations, contrary to petitioners' contention, *see* Pet. 18-19 & n.6, the fee need not be based on the cost of providing the goods or services, but can instead be based on comparative market prices. 686 F.2d at 930-34.

government regulation." 62 Fed. Reg. at 35896. *See* pp. 2-3 *supra*. As Government counsel stated in the district court, "the mass scale registration of commercial domain names has never, never been a Government function, ever." Tr. at 26-27. The domain name registration services that NSI provides are therefore not services provided by a government agency within the meaning of the IOAA.

Petitioners nevertheless argue that the decision below concerning the IOAA presents "an issue of overriding importance" warranting review by this Court. Pet. 18. The argument rests upon two mischaracterizations.

First, petitioners incorrectly state that the decision below is inconsistent with this Court's decision in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974) (hereinafter "*NCTA*"). Pet. 19. There is no inconsistency. That case did not involve the issue that petitioners claim was wrongly decided by the court of appeals here. *NCTA* involved licensing fees imposed by the Federal Communications Commission ("FCC") on cable television systems it regulated. The issue in *NCTA* was whether, under the IOAA, the FCC "used the correct standard in setting the fee." 415 U.S. at 343. The issue that petitioners seek to raise here — whether the IOAA applies to services provided *by private entities* such as NSI — was not present in *NCTA*. The services in *NCTA* were provided *by a Government agency*, and the applicability of the IOAA was therefore not in question.

Second, and more basic, petitioners' argument for certiorari rests on the assumption that NSI, in performing domain name registration services, is acting as the NSF's "agent" — *i.e.*, that NSI's domain name registration services are services provided by the NSF through the device of "contracting out" the performance of its statutory responsibilities to NSI. *See* Pet. 18-24 (referring throughout

to NSI as the NSF's "agent"). This assumption ignores the fundamental distinction, codified in federal statutory law, between situations calling for the use of a cooperative agreement (which is involved here) and those calling for the use of a procurement contract (which is not involved here).

As noted earlier (*see* pp. 5-6 *supra*), where the principal purpose of a transaction is to acquire goods or services "for the direct benefit or use of the United States Government," agencies use procurement contracts as the legal instrument. 31 U.S.C. § 6303. This is the case when agencies "contract out" the performance of services that the agencies have a duty to provide — for example, when agencies hire contractors to copy agency records requested by members of the public pursuant to the Freedom of Information Act or similar statutes.[8]

By contrast, agencies use cooperative agreements where, as here, the principal object is "to carry out a public purpose of support or stimulation authorized by a law of the United States," 31 U.S.C. § 6305(1), rather than to perform services for the Government. Here, the "public purpose of support or stimulation" authorized by Congress was, as the court of appeals discussed, to "foster and support access" to interconnected computer networks. 42 U.S.C. § 1862(g); Pet. 21a-22a. Congress determined that it was in the national interest to stimulate the growth of a robust system of interconnected networks that could be used "substantially for purposes in addition to research and education" and that would be available to the public at large, not just to the research and education communities. 42 U.S.C. § 1862(g).

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[8] As noted earlier, that was the situation in the two Comptroller general cases petitioners cite. Pet. 9 & n.4. In each case, the agency, instead of copying the documents using its own personnel, had the work done for it by a private firm with which the agency had a procurement contract for document processing, retrieval, and duplication services.

To implement this public purpose of fostering the growth of the Internet, the NSF entered into the Cooperative Agreement with NSI, under which NSI would provide domain name registration services to the public pursuant to private agreements between NSI and the domain name holders. The use of a cooperative agreement, rather than a procurement contract, reflects the fact that NSI was acting on its own behalf, and not as the NSF's "agent," in providing domain name registration services to members of the public with whom NSI entered into registration agreements. To be sure, Congress determined such privately provided services to be in the public interest, but that does not turn them into services provided by a Government agency.

The court of appeals discussed this point fully, emphasizing that this is not a situation where an agency has "farmed out" the performance of a statutory duty to a private contractor. Pet. 21a. Petitioners do not challenge the court's analysis on this point. Instead, they simply assume — without explaining the basis for the assumption — that NSI is acting as NSF's "agent," and from that premise they conclude that the registration services NSI provides are really services provided by a Government agency within the meaning of the IOAA. Petitioners offer no support for their premise, and their argument lacks a foundation in law.

For these reasons, petitioners have failed to show that there is any issue under the IOAA that warrants review by this Court. Petitioners merely seek to re-argue an issue that they have already argued and lost before two federal courts. The decision below is not inconsistent with any prior decision by this Court or any other court, and it does not warrant this Court's exercise of its discretionary certiorari jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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Dated: December 8, 1999

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 1:97CV02412 (TFH)
JURY TRIAL DEMANDED
CLASS ACTION

WILLIAM THOMAS; MYHOUSE COMMUNICATIONS; RUSSELL BRAEN, MANAGING PARTNER; THOMAS V. HOWELL; LIGHTNING LINKS COMMUNICATIONS, LLP; MASSELI & LANE; ATHENE, INC.; SARTORI ASSOCIATES; AND DELTA MICRO SYSTEMS, INC., FOR THEMSELVES AND AS REPRESENTATIVES OF ALL COMMERCIAL REGISTRANTS ON THE INTERNET

Petitioner,

v.

NETWORK SOLUTIONS, INC. AND NATIONAL SCIENCE FOUNDATION

Respondent,

FIRST AMENDED COMPLAINT

Plaintiffs, by their undersigned attorneys, for their Complaint allege that Network Solutions, Inc. (hereinafter "NSI"), and the National Science Foundation (hereinafter

"NSF") have, without Constitutional or statutory authority, unlawfully assessed Domain Name Registrants on the Internet Registration and Renewal Fees in excess of $100 million. Plaintiffs further allege that the same Defendants assessed and collected a tax, totaling over $50 million, as part of the Registration and Renewal Fee, for the "preservation and enhancement" of the Internet in violation of Article I, § 8, of the U.S. Constitution. Plaintiffs further allege that NSF violated the Independent Offices Appropriation Act when in September of 1995 the NSF fundamentally amended the original "cost-plus fee" contract with NSI to authorize NSI to collect a $100 Registration Fee and $50 annual Renewal Fee. In addition, Plaintiffs allege that Defendants violated the Administrative Procedure Act by imposing fees in disregard of applicable procedureal [sic] requirements. Finally, Plaintiffs allege that NSI and NSF, individually and with others, have violated the antitrust laws of the United States, and conspired with others to violate the antitrust laws of the United States, by, inter alia, administering the Domain Name Registration process to eliminate new entry and maintain a monopoly over the Domain Name Registration market. This was done by denying potential competitors offering other Top Level Domain name registration services access to an Essential Facility required for such registration. By way of remedies for these violations of law, Plaintiffs request, *inter alia*, that the improperly-imposed Registration and Renewal Fees be refunded to every Domain Name Registrant; that the unconstitutional tax be refunded to every Domain Name Registrant; that NSI pay antitrust damages, trebled, plus costs and attorney fees; that the Court declare the Defendants' conduct unlawful; that the Court order Defendants to place in a Court-managed account all Registration and Renewal Fees in excess of the costs of providing Domain Name Registration services; that the Defendants be enjoined from the future collection of Registration and Renewal Fees in

excess of the cost of providing such services; and that NSI be enjoined from denying access to potential competitors the Essential Facility which it exclusively controls.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction in this action pursuant to (a) §§ 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2); (b) §§ 4 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26); (c) the Little Tucker Act (28 U.S.C. § 1346(a)(2)); (d) the Administrative Procedure Act (5 U.S.C. § 702); (e) Federal Question jurisdiction (28 U.S.C. §§ 1331 and 1367); (f) the Independent Offices Appropriation Act (31 U.S.C. Sec. 9701); (g) Diversity jurisdiction (28 U.S.C. § 1332(a)); and the principles of pendant and/or ancillary jurisdiction. The amount in controversy, exclusive of interest and costs, exceeds $75,000.

2. The Court has personal jurisdiction over Defendant NSF, insofar as NSF is an agency of the Executive Branch of the United States Government. The Court has personal jurisdiction over Defendant NSI insofar as (a) NSI is an agent of NSF, an agency of the Executive Branch of the United States Government; (b) NSI has entered into contracts or agreements with NSF (or others) in this jurisdiction; (c) NSI has otherwise transacted business in this jurisdiction; and/or (d) NSI has committed acts or omissions giving rise to Plaintiffs' claims in this jurisdiction.

3. Venue in this action properly lies in the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1391, insofar as (a) Defendant NSF is an agency of the Executive Branch of the United States; (b) Defendant NSI is an agent of NSF; (c) contracts or agreements between NSF and NSI (or others) giving rise to Plaintiffs' claims were entered in the District of Columbia; and/or (d) the acts or

omissions of NSI and NSF giving rise to Plaintiffs' claims took place in the District of Columbia.

CLASS ACTION ALLEGATIONS

4. This action is brought as a class action, pursuant to Fed.R.Civ.P. 23(b)(1), (2) and (3), and Rule 203 of the Local Rules of the United States District Court for the District of Columbia, on behalf of all past or current Domain Name Registrants on the Internet (the "Registrants") from September 1995 through the present. This is a class action properly maintainable under Fed.R.Civ.P. 23 and Local Rule 203.

5. Upon information and belief, the size of the class is in excess of 1.5 million persons or entities (as of December 30, 1997), and joinder of all members is therefore impracticable.

6. The named Plaintiffs' claims are typical of the claims of the class. Plaintiffs are not antagonistic to the class and will fairly and adequately represent and protect the interests of the class.

7. All class members have an identical interest in seeking damages for the unlawful acts of Defendants resulting in the harm to the Plaintiffs complained of herein. Because of the amounts due each Registrant on an individual basis, it would be impracticable or impossible for each Registrant to bring this action individually. The fees charged to Registrants by Defendant NSI for Domain Name Registration Services is $100 per initial Domain Name registration and two years of use, and $50 per year renewal thereafter.

8. Common questions of law and fact predominate over individual questions, and therefore a class action is superior to other available methods for the fair and

efficient adjudication of this controversy. The questions of law and fact common to the class of Registrants includes, without limitation, (a) whether NSI violated §§ 1-2 of the Sherman Act; (b) whether the Defendants violated the IOAA et seq. and/or the Administrative Procedure Act (5 U.S.C. § 702); (c) whether the National Science Foundation has, without statutory authority, improperly authorized the imposition of charges or taxes on the Registrants in violation of Article I and Amendment V of the United States Constitution; and/or (d) whether Registrants are collectively entitled to equitable relief including (i) an injunction against the future imposition of unlawful charges and taxes; (ii) a decree declaring that all charges heretofore collected are to be held in constructive trust on behalf of the Plaintiffs and Class Registrants; and (iii) restitution of all wrongfully collected taxes or charges.

9. No exceptional difficulties are likely to be encountered in the prosecution of this action as a class action.

THE PARTIES

10. Plaintiff William Thomas resides at 1424 12th Street, N.W., Washington, D.C. 20005 and is a Domain Name Registrant with the Domain Name "prop1.org." Mr. Thomas has been required to pay Renewal Fees to NSI to maintain his status as a Domain Name Registrant on the Internet.

11. Plaintiff MyHouse Communications is a Maryland Partnership which resides at 706 Colby Avenue, Takoma Park, Maryland 20912 and is a Domain Name Registrant with the Domain Name "myhouse.com." Plaintiff MyHouse Communications has been required to pay Renewal Fees to NSI to maintain its status as a Domain Name Registrant on the Internet. Plaintiff Russell Braen, who

resides at 706 Colby Avenue, Takoma Park, Maryland 20912, is managing partner of MyHouse.

12. Plaintiff Thomas V. Howell resides at 1000 Connecticut Avenue, N.W., #9, Washington, D.C. 20036 and is a Domain Name Registrant who has been required to pay a Registration and/or Renewal Fee, to NSI to maintain his status as a Domain Name Registrant on the Internet.

13. Plaintiff Lightning Link Communications, LLC is a Florida Limited Liability Company which resides at 621 Lakeview Road, Clearwater, Florida 34616 and is a Domain Name Registrant with the Domain Name "LLC.net." Lightning Link Communications has been required to pay a Registration Fee and Renewal Fees for its Internet Domain Name.

14. Athene, Inc. is a Virginia Corporation which resides at 2420 Wilson Boulevard, Arlington, Virginia 22201 with the Domain Name "athene.com." Athene has been required to pay a Registration Fee and Renewal Fee to maintain its status as an Internet Domain Name Registrant.

15. Masseli and Lane is a Virginia Partnership which resides at 3426 No. Washington Boulevard, Suite 202, Arlington, Virginia 22201 with the Domain Name "mllaw.com." Mr. Willliam [sic] Lane is the managing partner. Masseli and Lane has been required to pay a Registration Fee to secure its status as an Internet Domain Name Registrant.

16. Plaintiff Sartori Associates resides at 2133 Estrada Parkway, Suite 624, Irving, Texas 75061 and is a Domain Name Registrant with the Domain Name "howard.com." Plaintiff Sartori Associates has been required to pay a Registration and/or Renewal Fee, to NSI to maintain its status as a Domain Name Registrant on the Internet.

17. Plaintiff Delta Micro Systems resides at 491 N. Washington Street, Suite 100, Rockville, Maryland 20850 and is a Domain Name Registrant with the Domain Name "deltamicrosystems.com" who has been required to pay a Registration and/or Renewal Fee, to NSI to maintain its status as a Domain Name Registrant on the Internet.

18. The remaining Plaintiffs are citizens residing across the United States (hereinafter collectively referenced as "Class Registrants").

19. The Plaintiffs and Class Registrants are Domain Name Registrants who registered for Internet Domain Name both prior to and after September 13, 1995. The Plaintiffs who registered prior to September 13, 1995 were not required to pay a Registration Fee, but are now required to pay an annual Renewal Fee of $50. The Plaintiffs who registered after September 13, 1995, have been required to pay a $100 Registration Fee and are also required to pay a $50 annual Renewal Fee.

20. Upon information and belief, Defendant Network Solutions, Inc. ("NSI"), a wholly-owned subsidiary of Science Applications International Corporation, is a corporation originally organized under the laws of the District of Columbia, and reincorporated in Delaware, with its principal business office at 505 Huntmar Park Drive, Herndon, Virginia 20170. NSI is an Internet Domain Name registration-service provider worldwide. NSI acts as the exclusive registrar for second level Domain Names within the .com, .org., .net, .edu and .gov. top-level domains ("TLDs").

21. Upon information and belief, Defendant National Science Foundation ("NSF") is an agency of the Executive Branch of the U.S. Government. Plaintiffs and Defendants use the Internet to engage in interstate commerce amongst the several states. The Defendants' conduct

complained of herein substantially interferes with interstate commerce.

FACTUAL BACKGROUND

22. The Internet is a network of computers through which businesses and individuals can send nearly instantaneous "E-mail" communications and disseminate information of various kinds through the "World Wide Web."

23. The Internet began as a network created in the 1960's by the Advanced Research Projects Agency ("ARPA"), of the United States Department of Defense ("DOD"). (The network established by ARPA is referred to herein as "ARPANET"). Throughout the 1970s and into the 1980s, numerous additional networks were established at geographically-diverse governmental, educational and research facilities.

24. The Internet commenced as a communications network linking various agencies of the United States government, the United States military and educational institutions and was created entirely with public funds, including funds of the Department of Defense and the National Science Foundation.

25. In 1982, the Transmission Control Protocol ("TCP") was implemented by ARPANET and DOD's network, CSNET. This allowed a connection of and intercommunication between CSNET and ARPANET. As other networks implemented the TCP standard, the number of networks interconnected through the Internet grew rapidly. In order to allow the computers ("Hosts") on each network to locate Hosts on other networks, each Host was assigned a numerical address (e.g., 205.160.45.115). Such numerical Host addresses are referred to herein as "IP Addresses."

26. Communications on the Internet are addressed using the form of address such as "jones@company.com." The part of the address after the "@" sign is called the "Domain Name." The Domain Name is a unique identifier which designates a set of computers on the Internet. Each part of this address ("Company," "com") designates a "Domain," which serves as a form of ZIP code for the Internet, allowing Users to send electronic mail and find pages on the World Wide Web. Registering a domain is essential to any person or business seeking to set up its site on the World Wide Web. For ease of reference and accessibility, each Host's IP Address was then assigned a unique alphanumeric name, the Domain Name. Because of the requirement that each Domain Name be unique, a central group of redundant Root Nameservers was established to house the translation database which allows any individual Host to locate other Hosts by way of the alphanumeric Domain Names. The Domain Name entered by the requesting Host is translated into the appropriate IP Address, and the requesting Host may then communicate directly with the Host at the IP Address corresponding to the Domain Name originally entered.

27. Before the Internet became a commercially-driven industry, a Domain Name System ("DNS") was developed in an attempt to imbue each alphanumeric Domain Name with information regarding the Host addressee. The Domain Name was divided into hierarchical fields, separated by periods (e.g., "namespace.doe.net"). The field appearing farthest right in the Domain Name (the "Top Level Domain" or "TLD") was arbitrarily limited to six possible codes (i.e., .COM, .EDU, .GOV, .MIL, .OR, and .NET), each denoting the type of entity or organization located at the corresponding IP Address.

28. In the Internet's architecture, a total of nine Root Nameservers were established (at taxpayers expense) as the Internet backbone. From 1993 and thereafter, by virtue of its contracts with NSF, NSI has controlled the registry of Domain Names on the Root Nameservers, and has claimed exclusive authority over the Configuration File on each such server. NSI controls the central Configuration File on each of the Root Nameservers, which serve as the central directory of the Root Nameservers, and thereby is able to exercise complete control over the registry of Domain Names.

29. All commerce with a Domain Name on the Internet must necessarily refer to the Configuration file on the NSI Root Nameserver in order to be directed to the appropriate Second Level Domain Names registered under the particular TLD.

30. In or about 1991, the National Science Foundation ("NSF"), an agency of the Executive Branch of the United States Government, performed administration and maintenance with respect to certain aspects of the non-military Internet registration services. These responsibilities included the registration of certain classes of Domain Names.

31. In 1993, NSF awarded to NSI a cost-plus-fixed-fee cooperative agreement (the "Original Contract") to provide non-military Internet registration and administration services. NSF granted to NSI control of the NSI Root Nameservers, and the Configuration File thereon, pursuant to Cooperative Agreement No. NCR-9218742 between the NSF and NSI. On information and belief, the Configuration File is under the exclusive control of NSI and is maintained exclusively by NSI. The Original Contract between NSF and NSI extends at least through March 31,1998, with provisions for a six-month "ramp-down" period.

32. Upon information and belief, NSI has stated that it does not plan to relinquish its exclusive control on the Domain Name registry. Rather, NSI has asserted property rights in the Domain Name Registry it has established under contract with the NSF. NSI has announced a program under which it purports to "reserve" Internet Domain Names, for its registration such Domain Names after its contract with NSF expires.

33. Under the Original Contract between NSF and NSI (awarded on a cost-plus-fixed-fee basis), NSI received a reimbursement for costs incurred in maintaining the NSI registry plus a fixed fee paid directly by NSF. Under the Original Contract, the Registrants were charged no Registration Fees, Renewal Fees, taxes or other charges for registration or access to the Internet.

34. On or about September 13, 1995, NSF fundamentally changed the Original Contract by entering into an amendment (hereinafter the "New Contract") which, inter alia, purportedly eliminated the cost-plus-fee basis for NSI's compensation. Under the New Contract, NSF purported -- without any statutory authorization -- to permit NSI to own and operate the NSI Registry, as well as the NSI Root Nameservers and Configuration File, for profit and as an unregulated commercial monopoly. As of December 30, 1997, over 1.5 million Domain Names were registered with NSI and NSI has unlawfully charged, taxed or collected in excess of $150 million in fees from the Registrants without proper authority.

35. Under the New Contract, NSF purported to authorize NSI to charge Registrants fees for Domain Name registration-service of $100 per initial Domain Name registration and two years of use, and $50 per annual renewal thereafter (the "NSI Fee"). The Registration Fee is allocated as follows under the New Contract: $70 to NSI "as

consideration for the services provided;" and $30 to be administered by NSI in preserving and enhancing the "Intellectual Infrastructure of the Internet."

36. The process of registering Domain Names is ministerial in nature. Today, the process is almost totally automated such that 95% of Domain Name applications are processed entirely by computer with no human involvement. On information and belief, NSI's total cost of registering Domain Names is significantly less than $10 per registration. The variable cost of registering Domain Names is significantly less than $1.00 per registration.

37. On or after September 13, 1995, Plaintiffs and the other Class Registrants applied to NSI for Domain Name registration(s) and have been required to pay the aforementioned NSI fees and taxes.

38. The New Contract fundamentally changed the terms of the Original Contract; fundamentally changed the course of performance under the Original Contract; fundamentally changed the contractual relationship between NSF and NSI; and, fundamentally changed and, indeed purported to invent, a "contractual" obligation for the Registrants vis a vis the imposition of a Registration Fee.

39. The New Contract is no longer a cost-plus-fixed-fee contract; rather, it is now a for-profit, unregulated commercial enterprise by which NSI has exacted from Registrants in excess of $100 million neither authorized nor contemplated within the original contract. Now, even Government entities must pay a fee to NSI for the Domain Names it runs and registers under the ".gov" TLD.

40. In derogation and violation of the "full and open competition" requirements of the Competition in Contracting Act, 41 U.S.C. § 253, et seq., NSF failed properly to open or submit the New Contract for competitive

bidding or to follow other required procedures. NSF's acts and omissions in this regard render the 1995 New Contract illegal and void ab initio.

41. The Independent Office Authorization Act ("IOAA") governs all independent federal agencies, including the NSF. Pursuant to the IOAA, federal agencies are required, by rulemaking, to establish criteria and guideline for the imposition of fees for services provided by the agency. Then, prior to the actual implementation of such fees, the federal agency is required by notice and comment to (a) propose a fee structure; (b) explain why the proposed fee is consistent with its published guidelines; and (c) seek public comment on the proposed fees prior to its implementation. The purpose of these provisions is to ensure that the fee imposed by the agency does not exceed the cost of providing the service.

42. The NSF failed to establish guidelines and failed to provide for notice and comment prior to the implementation of the Registration and Renewal Fees as required by the IOAA.

43. The Registration and Renewal fees exacted by NSF/NSI for Internet Domain Name Registration services grossly exceed the costs of providing the service. On information and belief the cost of providing Domain Name registration services are significantly less than $10 per registration. A leading trade journal has indicated that the competitive charge for registration services would be less than $10 per registration. Dr. Willie Black, the head of Great Britain's Internet registrar service, has publicly stated that the costs are significantly less than $7 per registration. In fact, the domain registration process in almost entirely automated and the variable cost of registration is less than $1. Thus, the $100 registration fee charged by NSF/NSI grossly exceeds

the cost of the service provided; the $50 renewal fee is unconscionable.

44. At all times relevant herein, NSF had no power or authorization to impose the aforementioned fees and taxes on its own behalf and thus, a fortiori, NSF had no power or authorization to convey such purported powers to NSL.

45. At all times relevant herein, NSF neither sought, nor has Congress granted, the vast new authority to NSF or NSI to charge the NSI Fees and taxes collected from Plaintiffs and Class Registrants who seek registration on the Internet.

46. In exercising its self-proclaimed power to assess Registration Fees and Renewal Fees, and to assess taxes, NSI has wrongfully collected in excess of $150 million, and, upon information and belief, will wrongfully collect additional tens of millions of dollars from Domain Name Registrants.

47. Because NSF lacks any statutory authority to convey such powers to NSI under the New Contract, the New Contract is ultra vires, unauthorized and/or contrary to the Congressional grant of authority to NSF; hence the New Contract is illegal and therefore void. Accordingly, all amounts which NSI has unlawfully taxed, charged or collected from Plaintiffs and Class Registrants pursuant to the New Contract must be returned to the Registrants.

48. Upon information and belief, at the time NSI persuaded NSF to abandon the cost-plus fixed-fee contract and enter the for-profit New Contract, NSI knew that the demand for Domain Name Registration had increased and would continue to increase exponentially, thereby leading to windfall profits for NSI.

49. The disengagement by NSF, the unauthorized, arbitrary, and excessive NSI Fee, NSI's monopoly control of the Configuration File and NSI Root Nameservers, and the artificially-limited supply of NSI TLDs, has resulted in the lack of competition in the Domain Name Registration Market, and has led to considerable dissatisfaction within the Internet Registrant community. Because of NSI's control over the Configuration File and Root Nameservers, NSI maintains a monopoly over the Domain Registration Process.

50. Upon information and belief, the U.S. Department of Justice has announced that it is investigating "the possibility of anticompetitive practices in the Internet address registration industry." NSI's prospectus filed with the Securities Exchange Commission on September 27, 1997, contains the following admission:

> On June 27, 1997, S.A.I.C. [NSI's parent] received a CID from the Department of Justice issued in connection with an investigation to determine whether there is, has been, or may be a violation of antitrust laws under the Sherman Act relating to Internet registration products and services. The CID seeks documents and information from [NSI's parent] and the Company [NSI] relating to their Internet registration business. Neither S.A.I.C. nor the Company is aware of the scope or nature of the investigation. The Company cannot reasonably predict whether a civil action will ultimately be filed by the DOJ or by private litigants as a result of the DOJ investigation, or, if filed, what such action would entail.

51. The relevant market for purposes of this Complaint is the market for initial registration and subsequent servicing of commercial non-governmental alphanumeric Domain Names corresponding to IP numbers in accordance

with the Domain Name System for use in enabling and facilitating communication between disparate Hosts on the Internet (the "Domain Name Registration Market").

52. Because of NSI's control over the Configuration File and certain Root Nameservers, NSI controls and maintains a monopoly over the Domain Registration Market and exercises monopoly power with respect thereto. No technical requirement or justification exists for the arbitrary limitation of the NSI TDLs in the Domain Registration process.

53. On information and belief, Defendants NSF and NSI individually, and in collusion with others, have agreed, colluded, and/or conspired to protect, maintain, and perpetuate NSI's monopoly over the Domain Name Registration market and to deny access to an Essential Facility to those who would establish competing Domain Name Registration services.

54. NSF's contract with NSI is in the nature of a service contract pursuant to which commercial Domain Names are matched or "mapped" to Internet Protocol Addresses ("IP Addresses"). The contract grants NSI authority to register select Domain Names: ".com," ".org," ".net," and, ".edu." The contract does not constitute a pervasive regulation of the Domain Name registration process. Nor did Congress intend to grant NSI a monopoly over the Domain Name registration process. Nor was the Cooperative Agreement intended to pre-emptively regulate the Domain Name process, or preempt all competing registration processes. Throughout the relevant period, NSF has neither possessed nor exercised day-to-day control over NSI operations. NSF has not and does not directly supervise or manage any NSI activities pertaining to the Domain Name registration process. The only "control" and "oversight" exercised by NSF over NSI and the Domain Name

registration process is the contractual requirement that NSF submit certain limited quarterly and annual reports. Indeed, many have referred to the Internet as an "unregulated" entity, removed from control of any governmental authority.

CLAIMS AGAINST DEFENDANTS

COUNT I

THE REGISTRATION AND RENEWAL FEES FOR THE "PRESERVATION AND ENHANCEMENT" OF THE INTERNET VIOLATE ARTICLE I, § 8 OF THE U.S. CONSTITUTION

55. Paragraphs 1 through 54 of the Complaint are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

56. NSF and NSI have dictated that 30 percent of the Registration and Renewal Fees be placed in a fund for the "Preservation and Enhancement of the Internet." By definition, the entirety of this fund collected by Defendant NSI is unrelated to, and over and above, compensation for its costs incurred in providing Registration and/or Renewal services.

57. The taxing authority is granted to "Congress" alone. Congress has not delegated any of its taxing authority to NSF.

58. NSF and NSI have unlawfully imposed and collected taxes upon Registrants, in the form of Registration and Renewal Fees, for the benefit of all Internet users.

59. As a result of NSF and/or NSI's unauthorized imposition and collection of Registration and Renewal Fees from Plaintiffs and Class Registrants for registration on the

Internet, the Plaintiffs and Class Registrants suffered substantial damages, in an amount that is not fully ascertainable, but which is believed to exceed $50 million.

COUNT II

REGISTRATION AND RENEWAL FEES THAT EXCEED THE COST OF PROVIDING REGISTRATION SERVICES VIOLATE ARTICLE I, § 8 OF THE CONSTITUTION

60. Paragraphs 1 through 59 of the Complaint are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

61. The taxing authority is granted to "Congress" alone. Congress has not delegated any of its taxing authority to NSF. NSF and NSI have unlawfully imposed and collected taxes upon Registrants, in the form of Registration and Renewal Fees, for the benefit of all Internet users.

62. The Registration and Renewal Fees collected by NSI and NSF that exceed their costs of providing pertinent services were unlawful taxes devoid of statutory or Constitutional authority.

63. By reason of defendants' wrongful conduct, plaintiffs have suffered substantial damages, in an amount that is not fully ascertainable, but which is believed to exceed $100 million.

COUNT III

THE REGISTRATION AND RENEWAL FEES FOR THE "PRESERVATION AND ENHANCEMENT" OF THE INTERNET VIOLATE THE INDEPENDENT OFFICES APPROPRIATION ACT

64. Paragraphs 1 through 63 are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

65. Defendant NSF, as an independent agency of the Executive Branch, is governed by the Independent Offices Appropriation Act, 31 U.S.C. § 9701 (1983), with respect to the imposition or exaction of assessments, fees or charges.

66. The IOAA requires that each charge for a service of value provided by the agency must be based on, inter alia, the costs incurred in providing the service. 31 U.S.C. § 9701.

67. Defendant NSI, acting on Defendant NSF's behalf in assuming control over the Domain Name registry, is therefore also subject to the IOAA requirement that assessments be based on costs incurred in providing the service in question.

68. The 30 percent portion of the assessment imposed on all Domain Name Registrants for the "preservation and enhancement" of the Internet is thus, by its definition, entirely unrelated to, and thus entirely above and beyond, any costs incurred by Defendant NSI, acting on behalf of Defendant NSF, in performing the Registration service.

69. The entirety of the assessment for the "preservation and enhancement" of the Internet that has been imposed and continues to be imposed upon each Domain Name Registrant, whether by Defendant NSF or by Defendant NSI acting on behalf of NSF, is therefore in violation of the foregoing substantive requirement of the IOAA.

70. As a result of this past and continuing violation, Plaintiffs and Domain Name Registrants have suffered substantial damages in an amount that is not ascertainable, but which is, upon information and belief, in excess of $50 million.

COUNT IV

THE REGISTRATION AND RENEWAL FEES OVERALL VIOLATE THE IOAA

71. Paragraphs 1 through 71 are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

72. Defendant NSF, as an independent agency of the Executive Branch, is governed by the Independent Offices Appropriation Act, 31 U.S.C. § 9701 (1983), with respect to the imposition or exaction of assessments, fees or charges.

73. The IOAA requires that each charge for a service of value provided by the agency must be based on, inter alia, the costs incurred in providing the service. 31 U.S.C. § 9701.

74. Defendant NSI, acting on Defendant NSF's behalf in assuming control over the Domain Name registry, is therefore also subject to the IOAA requirement that assessments be based on costs incurred in providing the service in question.

75. The Registration and Renewal Fees, as assessments, grossly in excess of Defendants' costs incurred in providing the services in question, thus violate the IOAA and are accordingly unlawful.

76. As a result of this past and continuing violation, Plaintiffs and Domain Name Registrants have suffered substantial damages in an amount that is not ascertainable, but which is, upon information and belief, in excess of $100 million.

COUNT V

THE REGISTRATION AND RENEWAL FEES VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

77. Paragraphs 1 through 76 are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative count thereto.

78. Defendant NSF, as an administrative agency of the Executive Branch, is subject to the procedural requirements of the Administrative Procedure Act, 5 U.S.C. § 553 ("APA").

79. Prior to imposing and collecting assessments from Plaintiffs and Domain Name Registrants for Registration Fees and Renewal Fees subject to the requirements of the IOAA, Defendant NSF was also required, by rulemaking, to establish criteria and guidelines for the imposition of fees for services provided by the agency. In addition, prior to the implementation of such fees, the federal agency is required by notice and comment (a) to propose a fee structure; (b) explain why the proposed fee is consistent with its published guidelines; and (c) seek public comment on the proposed fees prior to its implementation, pursuant to APA § 553(b). The purpose of these provisions is to ensure that the fee imposed by the agency does not exceed the cost of providing the service.

80. In fact, and as a result, the Registration and Renewal Fees greatly exceed Defendants' costs for providing Registration and/or Renewal services.

81. In violation of the APA, Defendant NSF satisfied none of the foregoing APA requirements prior to imposing and collecting Registration and Renewal Fees under the IOAA upon Plaintiffs and Domain Name Registrants.

82. The assessments that have been and continue to be imposed and collected by Defendant NSI, acting on behalf of Defendant NSF, have also been and continue to be subject to the same notice and comment requirements applicable to NSF acting in its own behalf.

83. All Registration and Renewal Fees that have been and continue to be imposed upon Plaintiffs and Domain Name Registrants by Defendant NSI acting on behalf of Defendant NSF (pursuant to the IOAA) were exacted without any notice or opportunity for public comment, and thus have also been in violation of the procedural requirements of the APA.

84. As a result of this past and continuing violation, Plaintiffs and Domain Name Registrants have suffered substantial damages in an amount that is not ascertainable with precision, but which is, upon information and belief, in excess of $100 million.

COUNT VI

NSI'S STATED PROGRAM TO CHARGE FEES FOR FUTURE REGISTRATION VIOLATES THE TERMS OF ITS CONTRACT WITH NSF

85 Paragraphs 1 through 85 are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set

forth herein, this Count is pled as an independent and alternative Count thereto.

86. The terms of the contract between NSF and NSI provide that NSI's control over and management of the registration of Domain Names is to terminate as of March 31, 1998.

87. Defendant NSI has acknowledged its plan to continue to charge fees for future registration of Domain Names, even where such registrations are to take place after the expiration of NSI's contract with NSF in March, 1998.

88. Defendant NSI's imposition and collection of such fees for registrations taking place after the expiration of the NSI-NSF contract is in violation of the contract's plain terms, which terminate NSI's management and control over any and all aspects of the Domain Name registry as of the contract's termination date.

89. As a result of such violations by Defendant NSI, Plaintiffs and Domain Name Registrants will suffer substantial damages.

COUNT VII

NSI'S STATED PROGRAM TO CHARGE FEES FOR FUTURE REGISTRATION VIOLATES THE FOREGOING CONSTITUTIONAL AND STATUTORY REQUIREMENTS

90. Paragraphs 1 through 89 are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

91. Defendant NSI has acknowledged its plan to continue to charge fees for future registration of Domain

Names, even where such registrations are to take place after the expiration of NSI's contract with NSF in March, 1998.

92. To the extent that Defendant NSI continues to implement its plan to impose and collect fees for Domain Name registrations taking place after the expiration of the NSI/NSF contract, such assessments are and will continue to be in violation of Article I, § 8 of the Constitution (for the same reasons as are set forth in Counts I-II, above); of the IOAA (for the same reasons as are set forth in Count III-IV, above); and of the APA (for the same reasons as are set forth in Count V, above).

93. As a result of such violations by Defendant NSI, Plaintiffs and Domain Name Registrants will suffer substantial damages.

COUNT VIII

THE BESTOWAL UPON NSI, WITHOUT COMPENSATION TO THE UNITED STATES, OF INTERNET DOMAIN NAME PROPERTIES FOR ITS PRIVATE EXPLOITATION AT THE EXPENSE OF DOMAIN NAME REGISTRANTS VIOLATES ARTICLE IV, § 3 OF THE CONSTITUTION

94. Paragraphs 1 through 93 of the Complaint are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

95. Article IV, § 3 of the United States Constitution provides that Congress alone shall have the power to dispose of property belonging to the United States.

96. The Domain Name registry, which is an outgrowth of the Domain Name System (including its Root

Nameservers and Configuration File on each such server) developed at taxpayers' expense, is now and has always been the property of the United States.

97. From 1993 and thereafter, by virtue of its contracts with Defendant NSF and by its own plan for continued control over the Domain Name registry after expiration of all such contracts, Defendant NSI has exercised and continues to exercise unfettered control over the Domain Name registry, including control over assessment and collection of millions of dollars of Registration and Renewal fees, such that Defendant NSI now asserts a property interest in the Domain Name registry and portions of fees obtained in connection therewith.

98. In connection with the contracts between NSI and NSF, upon information and belief, NSI has also been provided by Defendant NSF with computer hardware, software, and other equipment and property as to which NSI now asserts a property interest.

99. The foregoing Domain Name registry, and all fees (to the extent not in excess of costs incurred), as well as computer hardware, software, and other property provided by NSF to NSI in connection with the management and/or maintenance of the Domain Name Registry, are the property of the United States, that may not be disposed of by any entity other than Congress itself, pursuant to Article IV, § 3 of the U.S. Constitution.

100. Defendant NSF's bestowal of any and all such property upon Defendant NSI is in violation of Article IV, § 3 of the U.S. Constitution.

101. As a result of such violations, Plaintiffs and Domain Name Registrants have suffered and are continuing to suffer substantial damages believed to be in excess of $100 million.

COUNT IX

DEFENDANTS' CONSPIRACY TO PERPETUATE NSI'S EXCLUSIVE DOMINION AND CONTROL OVER THE DOMAIN NAME REGISTRATION MARKET VIOLATES SHERMAN ACT § 1

102. Paragraphs 1 through 101 of the Complaint are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is pled as an independent and alternative Count thereto.

103. Defendants NSI and NSF have acted in concert to force Registrants to pay excessive registration and other fees, to deny them access to more accessible and convenient Internet addresses, and to provide poor service. The intent and effect of such concerted action has been to erect barriers to entry (that have been enforced by NSI), and to protect and perpetuate NSI'S position of control in the Domain Name Registration Market by perpetuating its control of the Domain Name registry.

104. The relevant market for purposes of this Complaint is the market for initial registration and subsequent servicing of commercial non-governmental alphanumeric Domain Names corresponding to IP numbers in accordance with the Domain Name System for use in enabling and facilitating communication between disparate Hosts on the Internet (the "Domain Name Registration Market").

105. Defendants' conspiracy has foreclosed and eliminated competition in the Domain Name Registration market, in which the Internet's addresses are assigned.

106. Upon information and belief, the U.S. Department of Justice has announced that it is investigating "the possibility of anticompetitive practices in the Internet

address registration industry." NSI's prospectus filed with the Securities Exchange Commission on September 27, 1997, admits that NSI has already received a CID from the Department of Justice in connection with a Justice Department antitrust investigation.

107. Defendants' actions, which have had and continue to have an effect on Interstate Commerce, constitute an unlawful combination in restraint of trade, and are thus in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

108. Defendants NSI and NSF, individually and with others, have thus engaged in a conspiracy to maintain and perpetuate NSI's exclusive dominion and control over the Domain Name Registration market in violation of § 1 of the Sherman Antitrust Act.

109. Because of Defendants' unlawful restraint of trade, Plaintiffs and the Class Registrants have suffered substantial damages, in an amount that is not fully ascertainable, but which is believed to exceed $100 million.

COUNT X

NSI'S MONOPOLIZATION OF THE DOMAIN NAME REGISTRY MARKET VIOLATES SHERMAN ACT § 2

110. Paragraphs 1 through 109 of the Complaint are hereby incorporated by reference and realleged as though fully set forth. Without prejudice to any other averment or Count set forth herein, this Count is set forth as an independent and alternative Count thereto.

111. The relevant market for purposes of this Complaint is the market for initial registration and subsequent servicing of commercial non-governmental alphanumeric Domain Names corresponding to IP numbers in accordance with the Domain Name System for use in enabling and

facilitating communication between disparate Hosts on the Internet (the "Domain Name Registration Market").

112. NSI has engaged in (at minimum) the conduct set forth in this Complaint with the intent of acquiring, maintaining and perpetuating its monopoly power in the Domain Name Registration Market, and maintaining its exclusive control over the Configuration File which is an essential facility to that market, to the exclusion of other competitors who are capable of providing competitive domain name registrations.

113. Upon information and belief, the U.S. Department of Justice has announced that it is investigating "the possibility of anticompetitive practices in the Internet address registration industry." NSI's prospectus filed with the Securities Exchange Commission on September 27, 1997, admits that NSI received a CID from the Department of Justice in connection with a Justice Department antitrust investigation.

114. NSI exclusively controls, and has exercised exclusionary conduct to maintain and perpetuate its monopoly over, the Domain Name Registration Market. On information and belief, other entities have unsuccessfully attempted to enter the Domain Name Registration Market only to be excluded by the conduct of NSI in refusing to allow potential competitors to provide competitive Domain Name Registrations. NSI has accomplished this by wilfully refusing to allow potential competitors to introduce additional TLD's and/or Domain Names to the Configuration File, the Essential Facility controlled by NSI. No technical requirement or justification exists for the arbitrary limitation of TLD's by NSI in the relevant market. If the potential competitors are allowed to introduce new TLD's and/or Domain Names to the Configuration File, the additional competition and supply of Domain Name Registration

services would result in lower prices and better service to consumers, including the Plaintiffs and Class Registrants. Consequently, consumer welfare has been injured by NSI's monopolistic practices which have yielded NSI millions of dollars in supra-competitive gains.

REMEDIES

COUNT XI

DAMAGES

115. Plaintiffs reallege all prior paragraphs as relevant.

116. Based on Defendants' unlawful conspiratorial conduct foreclosing competition in the Domain Name Registry market, Plaintiffs request damages on their Sherman Act § 1 claim as found by a jury, trebled, with attorney fees.

117. Based on Defendants' unlawful conduct creating and perpetuating NSI's monopoly in the Domain Name Registry market, Plaintiffs request damages on their Sherman Act § 2 claim as found by a jury, trebled, with attorney fees.

COUNT XII

REFORMATION

118. Plaintiffs reallege all prior paragraphs as relevant.

119. Plaintiffs ask the Court to order Reformation of the contract between NSF and NSI to provide that the Registration and Renewal Fees not exceed the costs of providing Domain Name registration services; that NSI be prohibited from collecting any Registration and Renewal Fees after March 31, 1998; and that all properties of the

government and NSF used by NSI be returned to NSF at the end of the contract term.

COUNT XIII

RESTITUTION

120. Plaintiffs reallege all prior paragraphs as relevant.

121. Plaintiffs ask the Court to order NSF/NSI to make Restitution to all Internet Domain Name Registrants of Registration and Renewal Fees collected contrary to the U.S. Constitution and federal statute. Specifically, Plaintiffs ask the Court to order the restitution of all Registration and Renewal Fees paid to Defendants which exceed the demonstrated cost of providing Domain Name registration services.

COUNT XIV

REFUND

122. Plaintiffs reallege all prior paragraphs as relevant.

123. Plaintiffs ask the Court to order NSF/NSI to refund to all Internet Domain Name Registrants of Registration and Renewal Fees (plus interest) collected contrary to the U.S. Constitution and federal statute. Specifically, Plaintiffs ask the Court to order the refunding of all Registration and Renewal Fees (plus interest) paid to Defendants which exceed the demonstrated cost of providing Domain Name registration services.

COUNT XV

DECLARATORY RELIEF

124. Plaintiffs reallege all prior paragraphs as relevant.

125. Plaintiffs ask the Court to declare as follows:

a. The Registration and Renewal Fees, in general, that are in excess of Defendants' costs, and the Fees applied toward the Preservation and Enhancement Fund in particular, which by definition are in excess of such costs, violate the U.S. Constitution, Article I, § 8;

b. The Registration and Renewal Fees in excess of Defendants' costs incurred in providing Domain Name registration and/or renewal services violate the IOAA;

c. The Registration and Renewal Fees, which were imposed upon and collected from Plaintiffs and Class Registrants in disregard of applicable procedural requirements regarding rulemaking, notice and comment, thus resulting in inflated assessments grossly exceeding Defendants' costs, violate the APA;

d. All Registration and Renewal Fees imposed by Defendant(s) with respect to Domain Name Registrations to take place after March 31, 1998, violate the Cooperative Agreement between the Defendants;

e. The Cooperative Agreement, by which property of the United States is bestowed upon Defendant NSI without compensation to the government, is ultra vires and violates the U.S. Constitution, Article IV, § 3; and

f. NSF/NSI have violated the Sherman Act, §§ 1 and 2.

COUNT XVI

INJUNCTIVE RELIEF

126. Plaintiffs reallege all prior paragraphs as pertinent.

127. Plaintiffs ask the Court to ENJOIN:

a. NSI from collecting henceforth any Registration and Renewal Fee in excess of the greater of its demonstrated costs of providing domain name registration, or $10 per registration, whichever is less, and command that all such Fees be placed in an ESCROW ACCOUNT under Court supervision until a final determination is made of such costs of service; and

b. NSI from using for its own benefit the Internet Domain Registration property given, loaned or transferred to it by NSF, without compensation to the government.

COUNT XVII

UNJUST ENRICHMENT

128. Plaintiffs reallege all prior paragraphs as relevant.

129. By imposing and exacting Registration and Renewal Fees grossly in excess of their costs incurred for Registration and/or Renewal services, Defendant NSI has been unjustly enriched at the expense of Plaintiffs and Class Registrants.

130. Plaintiffs and Class Registrants, accordingly, request that this Court return to them all such funds in excess of NSI's incurred costs.

PRAYER FOR RELIEF

WHEREFORE, named Plaintiff Domain Name Registrants, on behalf of themselves and on behalf of all members of the class of Domain Name Registrants, and in accordance with the foregoing remedies specified and requested, pray that this Court enter a judgment against the Defendants NSI and NSF:

a. Awarding damages, trebled, for Defendants' Sherman Act violations;

b. Reforming the contracts between Plaintiffs to preclude any unlawful fees in excess of Defendants' costs;

c. Declaring:

(1) that the Registration and Renewal Fees constitute an unlawful tax in violation of Article I, § 8 of the US. Constitution;

(2) that the Registration and Renewal Fees imposed upon Domain Name Registrants in excess of Defendants' costs is an invalid assessment in violation of the IOAA, 31 U.S.C. § 9701.

(3) that these Registration and Renewal Fees are invalid assessments imposed in disregard of the procedural requirements of the APA, 5 U.S.C. § 533; and

(4) that Defendant NSI's stated program to charge fees for future registration is invalid and unlawful.

d. Enjoining Defendants

(1) from continuing to collect any and all Registration and Renewal fees in excess of Defendants' demonstrated costs; and

(2) from spending, liquidating, or disposing of any of the funds collected by Defendants unlawfully from the Plaintiffs and Class Registrants.

e. Restoring to Plaintiffs and Class Registrants

(1) all Registration and Renewal fees collected by Defendants for purposes of the "preservation and enhancement" of the Internet; and

(2) all additional Registration and Renewal fees collected by Defendants that were in excess of their demonstrated costs.

f. Refunding to Plaintiffs and Class Registrants all unlawfully collected Registration and Renewal fees, plus interest.

g. For Plaintiffs' costs and reasonable attorneys' fees herein expended and incurred; and

h. For any and all other relief to which the Plaintiffs and Class Registrants may appear to be entitled.

JURY TRIAL DEMANDED

Plaintiffs hereby demand trial by jury on all claims and issues so triable.

Respectfully submitted,

/s/

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Dated: January 30, 1998